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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-795

JAMES CISSELL, Trustee,
Petitioner,

v.

AMERICAN HOME ASSURANCE CO.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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STATEMENT OF THE CASE

Respondent generally concurs with the statement of the case set forth in Petitioner's petition. However, there are certain other pertinent factors which should also be discussed.

World Academy purchased a Travel Agent's Professional Liability policy, which included several different coverages, from American Home Assurance Company. The policy was issued on February 16, 1970. There was coverage for personal injury, property damage and for what has been generally referred to throughout this litigation as "errors and omissions" coverage. A partial text of this latter coverage is set forth at Page 3 of the petition. The

policy had limits of $3,000,000.00 and World Academy paid a premium approximating $5,000.00.

Shortly after assuming his position as Trustee, Plaintiff submitted a claim form to Defendant demanding that Defendant pay to Plaintiff the sum of $2,300,000.00 under the "errors and ommissions" coverage, which claim was denied on the basis of non-coverage. Plaintiff alleged, as the basis of his claim, that the officers and directors had mismanaged the company, squandering corporate funds, as a result of which World Academy became insolvent and was unable to perform the services for which the students had contracted. Subsequently, Plaintiff submitted a second claim and demanded that Defendant pay him the policy limits, $3,000,000.00, which claim was also denied on the same basis.

In March, 1971, Plaintiff commenced this action by filing a Complaint in the United States District Court, Southern District of Ohio, Western Division. The primary objective of the complaint, as revealed by the prayer, was a money judgment and a recovery against Defendant in the amount of $3,000,000.00. This fact did not go unnoticed by either the District Judge nor the Sixth Circuit Court of Appeals. Only in the alternative did Plaintiff seek declaratory relief concerning the rights and obligations of the parties and certain procedures to be followed in the Bankruptcy Court involving the presentation and allowance of claims.

Concerning the Trustee's attempt to effect a monetary recovery, the District Court noted:

> . . . The Trustee has not presented student claims or any other claims to the Bankruptcy Judge for allowance or disallowance by reason of an apprehension that that course might procedurally block the assertion of the claims in the aggregate against the Defendant . . . (A. 19)

> . . . In October of 1970, the Trustee set forth against the Defendant on its proof of loss form for approximately $3,350,000.00 *and made demand for the payment of it.* This part of the claim basically represents the students' claims in the aggregate . . . (A. 19-20) (Emphasis supplied.)

> . . . The Plaintiff is asserting one claim under the policy in the amount of approximately $3,000,000.00 . . . (A. 31)

The Sixth Circuit similarly noted that Plaintiff was "seeking performance of an insurance policy" (A. 33) and had demanded payment of the policy limits. (A. 35)

The Petition filed herein quite frankly admits that the Trustee is asserting the claims of student creditors of World Academy.

ARGUMENT OPPOSING REVIEW

A. Although the Sixth Circuit Court of Appeals did determine that Plaintiff lacked standing to assert claims belonging to specific creditors and to pursue property which did not belong to the Bankrupt nor passed to the Trustee by reason of his position, it did not rule that the Trustee lacked standing to bring a declaratory judgment action on the policy in question nor did it misinterpret the Federal Declaratory Judgment Act (28 U.S.C. § 2201).

Plaintiff complains that he did not receive the declaratory relief sought from the Court of Appeals and that, ac-

cordingly, prejudicial error has been committed. However, the reason such relief was not forthcoming is very simple: He neglected to request it.

Although both lower courts correctly noted that the complaint sounded in declaratory judgment, Plaintiff failed to raise that issue on appeal, being obsessed with the main thrust of his complaint i.e. a $3,000,000.00 recovery. The Sixth Circuit observed:

> "Plaintiff's appeal generally raises the issue whether the District Court erred in its interpretation of the insurance policy and not submitting factual issues to a jury." (A. 34)

Thus, there was nothing before the Court of Appeals that would warrant its granting a declaratory judgment because Plaintiff didn't raise that issue nor request instructions.

Further, a fair interpretation of the decision, is that the Court assumed the Plaintiff's standing to seek a declaratory judgment and passed over that issue in order to rule upon the main issues raised on appeal, whether or not the policy covered the Plaintiff's claims and the Plaintiff's entitlement, if any, to the insurance proceeds. By dismissing the Complaint, the Sixth Circuit effectively affirmed the District Court's determination of non-coverage and effectively "declared" the rights of the parties to the policy. It would appear that the Sixth Circuit felt the issues raised were insufficient to warrant instructions to Plaintiff. In effect, the Sixth Circuit advised Plaintiff that his duties were set forth in the Bankruptcy Act, that he should perform them and he was advised to discontinue his "role of an advocate" for the student creditors. (A. 38).

B. The Court of Appeals properly ruled that the Trustee lacked standing to bring an action in which he asserted and attempted to enforce the claims of the student creditors.

As noted by the Sixth Circuit, the Trustee is a creature of statute and has only those powers specifically conferred upon him by the Bankruptcy Act. (A. 36) The Trustee in Bankruptcy represents the Bankrupt, not the creditors of the Bankrupt. Although the Trustee is appointed for the *benefit* of creditors, he does not represent them, nor can he assert their claims, even if those claims have been assigned to him for the purpose of so doing. *Barnes* v. *Hirsch,* 212 N.Y.S. 356, 215 App. Div. 10, Aff'd. Per Curiam 242 N.Y. 555 (1926). (See also those authorities cited at A.36).

This is a very basic concept of bankruptcy law which the Plaintiff has overlooked and which this Court is being asked to ignore. The Sixth Circuit correctly noted that the Trustee has standing only to bring actions which the Bankrupt could have brought had it remained solvent. (A. 36)

Thus, even though the question of coverage has been resolved adversely to the Plaintiff, he still is not entitled to the proceeds of the insurance policy under any circumstances. Instead, the policy appears to be intended to benefit a specific group of creditors, i.e. student travelers, and only they are entitled to assert the claims that the Trustee is attempting to assert in this action.

Nor are the student creditors without a remedy. Even though the Bankruptcy Court issued several restraining orders preventing the student creditors from instituting and maintaining actions against World Academy, in cases such as this, where insurance may be available to pay certain of the Bankrupt's liabilities, it rests within the sound

judicial discretion of the Bankrutcy Court to modify or dissolve such restraining orders. Surely if any student creditors had requested that to be done in this case, it would have been done.

In addition, the concepts of "ease of administration" and "practicality", although quite desirable in the administration of bankrupt estates, cannot be invoked to overcome basic well-established legal principles. Our society remains one governed by the Rule of Law fairly applied. To abandon that foundation in the name of "practicality" or "ease of administration" is unthinkable.

The ruling of the Court of Appeals should be interpreted as advising the Trustee to abandon his quest for the insurance proceeds and, to the contrary, to proceed with the duties imposed upon him by statute as, for example, objecting to claims.

The decision of the Sixth Circuit is neither controversial nor violative of any federal statute. It recognizes and recites certain legal concepts basic to the Bankruptcy Act and affirms them. It is submitted, therefore, that this is not a case of great general interest and that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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